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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-210

THOMAS MONROE WALTON,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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PRELIMINARY COMMENT

This Brief of Respondent in Opposition to Petition for Writ of Certiorari is filed pursuant to the request of this Court dated September 27, 1978.

OPINIONS BELOW

The Order of the Court of Appeals of Maryland, reported at 282 Md. 514 (1978), dismissing the writ of certiorari as improvidently granted, is included as an Appendix to this Brief. The opinion of the Court of Special Appeals of Maryland, *Walton v. State*, No. 103

(Md. App., filed Oct. 24, 1977), is unreported and is included as Appendix A.1-A.7 of the Petition.

JURISDICTION

Petitioner has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the trial judge properly deny Petitioner's motion to suppress a tape recording, made as a result of a "body tap," and the fruits derived therefrom where the order therefor was allegedly defective under 18 U.S.C. §§ 2510 *et seq.*?

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

In addition to those statutes reprinted in the Petition at 3-15, the following statutes and rules are involved:

Md. Ann. Code art. 27, § 125B

Courts Article of the Maryland Code, § 10-402(c)(2):

"It is lawful under this subtitle for an investigative or law enforcement officer acting in a criminal investigation or any other person acting at the prior direction and under the supervision of an investigative or law enforcement officer to intercept a wire or oral communication in order to provide evidence of the commission of the offenses of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in controlled dangerous substances, or any conspiracy to commit any of these offenses, where the person is a party to the communication or one of the parties to the communication has given prior consent to the interception."

Courts Article of the Maryland Code, § 10-405:

"Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle."

18 U.S.C. § 2511(c)(2)

STATEMENT OF THE CASE

Respondent accepts the facts as presented in Petitioner's Statement. Petition at 16 only.

ARGUMENT

THE PROVISIONS OF 18 U.S.C. §§ 2510 *ET SEQ.* ARE INAPPLICABLE TO THE INSTANT CASE BECAUSE THE INFORMANT CONSENTED TO THE PLACEMENT OF THE TRANSMITTER ON HIS PERSON. EVEN IF THE AFFIDAVITS AND ORDER DID NOT COMPLY WITH THE APPLICABLE STATUTE (THEN MD. ANN. CODE ART. 27, § 125A¹), THE RECORDING AND FRUITS DERIVED THEREFROM WOULD NOT BE EXCLUDED BECAUSE "BODY TAPS" DO NOT GIVE RISE TO A FOURTH AMENDMENT PROBLEM.

18 U.S.C. § 2511(2)(c) provides:

"It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."²

¹ Repealed by 1977 Md. Laws, ch. 692, § 1, effective July 1, 1977. For present provisions as to wiretapping and electronic surveillance, see the Courts Article of the Maryland Code, §§ 10-401 *et seq.*

² See now Courts Article of the Maryland Code, § 10-402(c)(2).

In *Pennington v. State*, 19 Md. App. 253, 274 (1973), cert. denied, 271 Md. 742, cert. denied, 419 U.S. 1019 (1974), the Court of Special Appeals of Maryland noted that "[t]he federal act expressly exempts consensual and participant monitoring by law enforcement agents from the general prohibitions against surveillance without prior judicial authorization and permits the fruits to be received as evidence." Thus, the federal wiretap law is inapplicable to the instant case because the informant consented to the placement on his person of a transmitter so as to record the conversation between himself, Petitioner, and co-defendant.

Petitioner asserts, however, that there must be compliance with 18 U.S.C. §§ 2510 *et seq.* in the instant case. The Court of Appeals of Maryland noted in *State v. Siegel*, 266 Md. 256, 272 (1972):

"The Maryland statutes concerned with the interception of wire or oral communications are Code (1957, 1971 Repl. Vol.), Art. 27, §§ 125A-D These provisions are 'applicable State statute[s]' as envisioned under [18 U.S.C.] § 2516(2) and whether each of their terms relating to the application or grant of an order is constitutional *vel non* is of no consequence. Once the hurdle of finding an applicable Maryland law authorizing interception is overcome, compliance must be had with whichever law is more constricting, be it federal or state."

Similarly, in *Pennington*, *supra* at 277 n.14, the Court of Special Appeals noted:

"If the State statute be more restrictive than the federal act so as to prohibit participant monitoring by electronic devices, then the interception of communications in such circumstances would be lawful only if under the authority of an order which, although contemplated by the State statute, § 125A(b), must comply with the more restrictive dictates with respect to such orders of the federal act."

It is clear, however, that determination of which statute is more restrictive and compliance with the more restrictive provisions of both are unnecessary where one statute, herein, as in *Pennington*, 18 U.S.C. §§ 2510 *et seq.*, is inapplicable because of an exemption under § 2511(2)(c):

"We have found that the recording of the communications . . . was neither constitutionally proscribed nor prohibited by the federal act. It would be illegal, therefore, only if the State statute made it so. There is no need, however, for us to determine whether Code, Art. 27, § 125A, *et seq.*, is more restrictive than the federal act so as to forbid participant monitoring." *Pennington v. State*, *supra*, at 276-77 (footnote omitted).

Because the "body tap" in the instant case is exempted by 18 U.S.C. § 2511(2)(c) from compliance with §§ 2510 *et seq.*, the cases on which Petitioner relies for the proposition that a statement of other investigatory techniques is required under §§ 2518(1)(c) and (3)(c) (Petition at 8, 10), and that the order state, pursuant to 18 U.S.C. § 2518(5) (Petition at 11), that execution is to be as soon as practicable — *United States v. Giordano*, 416 U.S. 505 (1974); *United States v. Curreri*, 388 F. Supp. 607 (D. Md. 1974) — are inapplicable.

Thus, it is only necessary to examine the "body tap" herein in relation to the Maryland statute which authorized it. Petitioner urges that the recording and all fruits derived therefrom should have been excluded because the affidavits in support of the application for the "body tap" did not contain a statement as to other investigatory techniques, required by 18 U.S.C. §§ 2518(1)(c) and (3)(c), and the order did not state, pursuant to 18 U.S.C. § 2518(5), that execution was to be as soon as practicable. These allegations have no merit because the federal statute, as noted above, is inapplicable in the instant case and because then Md. Ann. Code

art. 27, § 125A (Petition at 3-5) did not contain such requirements.

Then Md. Ann. Code art. 27, § 125B provided for a criminal penalty, rather than exclusion of evidence, where § 125A was violated:

"Any person or persons who shall use any electronic device or equipment or other devices or equipment of any type whatsoever, in such manner as to overhear or record any part of the conversation or words spoken to or by any person in private conversation, without their knowledge or consent, either expressed or implied, except in compliance with the terms of this subtitle, shall be deemed guilty of a misdemeanor, subject, upon conviction, to a fine not exceeding five hundred dollars (\$500), or to imprisonment for not exceeding one (1) year, or to both such fine and imprisonment, in the discretion of the court. Nothing herein contained shall be construed or implied to affect any employee of a telephone company or a telegraph company, as those terms are defined in Article 78 of the Annotated Code of Maryland, while in the regular course of his employment by such company, and engaged in company business."

The rationale for not providing the remedy of exclusion is that, as noted in *Pennington v. State*, *supra*, participant monitoring involves no violation of the Fourth Amendment guarantee against unreasonable searches and seizures. This Court explained the rationale in *United States v. White*, 401 U.S. 745, 751-52 (1971):

"Concedely a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters with the defendant and without otherwise violating the latter's Fourth Amendment rights. . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conver-

sations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person. . . .; (2) or carries radio equipment which simultaneously transmits the conversations either to recording equipment located elsewhere or to other agents monitoring the transmitting frequency. . . . If the conduct and revelations of an agent operating without electronic equipment do not invade the defendant's constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent or by others from transmissions received from the agent to whom the defendant is talking and whose trustworthiness and defendant necessarily risks.

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem . . . is what expectations of privacy are constitutionally 'justifiable' — what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustration of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants. . . . If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case. . . .

Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts

their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his. In terms of what his course will be, what he will or will not do or say, we are unpersuaded that he would distinguish between probable informers on the one hand and probable informers with transmitters on the other. Given the possibility or probability that one of his colleagues is cooperating with the police, it is only speculation to assert that the defendant's utterances would be substantially different or his sense of security any less if he also thought it possible that the suspected colleague is wired for sound. At least there is no persuasive evidence that the difference in this respect between the electronically equipped and the unequipped agent is substantial enough to require discrete constitutional recognition, particularly under the Fourth Amendment which is ruled by fluid concepts of 'reasonableness.'" (Citations omitted).

See Hoffa v. United States, 385 U.S. 293 (1966); *Lopez v. United States*, 373 U.S. 427 (1963); *On Lee v. United States*, 343 U.S. 747 (1952). Moreover, under § 125B, even if § 125A did contain the requirements to which Petitioner alludes, the remedy for non-compliance would not have been exclusion.³ *See Reed v. State*, 35 Md. App. 472 (1977), *rev'd on other grounds*, No. 62 (Md., filed Sept. 6, 1978); *Pennington v. State*, *supra*.

³ 18 U.S.C. § 2518(10)(a) (Petition at 14-15) provides, in pertinent part, however, that the remedy for a violation is suppression. *See, e.g., United States v. Giordano*, *supra*; now Courts Article of the Maryland Code, § 10-405.

CONCLUSION

For the foregoing reasons and because (1) the repeal of Md. Ann. Code art. 27, § 125A (*see n.1, supra*), and (2) the enactment of an exemption for participant monitoring under now Courts Article of the Maryland Code, § 10-402(c)(2) (*see n.2, supra*) render this case not within the contemplation of Sup. Ct. R. 19, the Court of Appeals properly dismissed the writ of certiorari, and Respondent prays that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX

*In The
Court of Appeals of Maryland*

September Term, 1977

(No. 137)
Thomas Monroe Walton
v.
State of Maryland

(No. 138)
Lyn Jayne Silk
v.
State of Maryland

ORDER

The petitions for certiorari not having disclosed that the pertinent Maryland statute, controlling in these cases, Maryland Code (1957, 1976 Repl. Vol.), Article 27, § 125A, had been repealed by Chapter 692 of the Acts of 1977, effective July 1, 1977; and

The State having filed no answer in opposition to the petitions for a writ of certiorari pointing out the fact that § 125A had been repealed; and

It appearing, in view of the repeal of § 125A, that these cases do not involve the public interest within the contemplation of § 12-203 of the Courts and Judicial

Proceedings Article; therefore, it is this 8th day of May, 1978

ORDERED, by the Court of Appeals of Maryland, that the writs of certiorari be, and they are hereby, dismissed, petitions having been improvidently granted; and it is further

ORDERED that the State of Maryland shall pay all costs in these proceedings.

/s/ ROBERT C. MURPHY,
Chief Judge.